U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 05 March 2003

CASE NO.: 2002-LHC-962

OWCP No.: 5-112545

In the Matter of

CURTIS W. BUTLER,
Claimant

v.

NEWPORT NEWS SHIPBUILDING & DRY DOCK COMPANY,
Employer

APPEARANCES:

Chanda Wilson Stepney, Esquire
For the Claimant

Benjamin Mason, Esquire
For the Employer

BEFORE: RICHARD A. MORGAN
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This case arises from a claim for compensation under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et. seq*., hereinafter referred to as the "LHWCA" or the "Act" and the implementing regulations, 20 C.F.R. parts 701 and 702. The Act provides compensation to certain employees (or their survivors) engaged in maritime employment for occupational diseases or unintentional work-related injuries, irrespective of fault, occurring upon the navigable waterways of the United States or certain adjoining areas, resulting in disability or death. With limited exceptions, the Act provides the exclusive remedy for such injuries against maritime employers which have secured the payment of benefits. See 33 U.S.C. § 905(a).

PROCEDURAL HISTORY[1]

The claimant filed his claim on December 4, 2001. The claimant asserts that as a result of a neck injury sustained on March 7, 2001 he is entitled to temporary partial disability benefits beginning September 11, 2001 through October 23, 2001, temporary total disability benefits from October 24, 2001 through November 24, 2001, and temporary partial disability benefits from November 25, 2001 to the present and continuing. On December 17, 2001, the Director, Office of Workers' Compensation Programs (OWCP), referred this case to the Office of Administrative Law Judges (OALJ) for a hearing. The case was assigned to me on June 15, 2002.

A formal hearing was held before the undersigned on October 18, 2002, at which the parties were given a full and fair opportunity to present evidence and argument. Claimant's Exhibits (CX) 1- 13 and Employer's Exhibits (EX) 1- 2 were admitted to the record without objection.

I. STIPULATIONS[2]

The parties stipulate and I find:

A. The claimant is covered by the Act which applies to this proceeding.

B. The claimant and the employer were in an employee-employer relationship at the relevant times.

C. The claimant sustained an injury on March 7, 2001.

D. That timely notice of his injury was given by the claimant to the employer.

E. That a timely claim for compensation was filed by the claimant.

F. That the employer filed a timely Notice of Controversion and a timely report of the accident.

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[1] The following references will be used: "TR" for the official hearing transcript; "ALJ EX" for an exhibit offered by this Administrative Law Judge; "CX" for a Claimant's exhibit; "DX" for a Director's exhibit; "IX" for a Carrier's exhibit; and, "EX" for an Employer's exhibit.

[2] The private parties cannot bind the Special Fund absent the Director's agreement to the stipulations. *Brady v. J. Young & Co.*, 17 BRBS 46 (1985), *aff'd on recon*., 18 BRBS 167 (1985) *cited with approval in Gupton v. Newport News Ship Building and Dry Dock*, 33 BRBS 94 (1999). Stipulations affecting the Special Fund may be accepted if there is evidence of record to support them. *Justice v. Newport News Shipbuilding & Dry Dock Co.*, 34 BRBS 97 (2000)(proper to accept stipulation involving non-party) *citing McDougal v. E.P. Paup Co.*, 21 BRBS 204 (1988), *aff'd in part sub. nom. E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT)((9th Cir. 1993).

G. That the claimant was originally treated by the shipyard clinic and later by an outside physician.

H. That the claimant was seen by Dr. Budorick for an independent evaluation.

I. The claimant seeks temporary partial disability benefits from September 11, 2001 through October 23, 2001 and from November 25, 2001 to the present and continuing based on a wage earning capacity of $125.00 per week. Additionally, the claimant seeks temporary total benefits from October 24, 2001 through November 24, 2001. (TR 7-13).

II. ISSUES

I. Whether the claimant's alleged neck injury and disability is related to his March 7, 2001 work related injury?

II. What is the claimant's correct average weekly wage?

III. FINDINGS OF FACT

A. BACKGROUND

The claimant was born on September 25, 1955 and is a resident of Virginia Beach, Virginia. He began working for the employer in February of 1991. On March 7, 2001, the claimant, while working as a welder at the employer's shipyard, was standing on a saw horse when a wire feeder came down and hit him on top of his head and knocked him off the saw horse. (TR 16-18). The claimant added that he did not have a hard hat on at the time of the injury. (TR 18). The claimant estimated that the wire feeder weighed forty five (45) pounds. (TR 19). Beginning on March 9, 2001, the claimant sought treatment at the shipyard clinic for pain related to the March 7, 2001 incident.

On March 9, 2001, Dr. Tornberg placed the claimant on temporary work restriction until March 12, 2001, restricting safety sensitive work or significant heights. Thereafter, on September 11, 2001, Dr. Tornberg placed the claimant on permanent work restriction, restricting overhead work, lifting over twenty pounds, vertical ladders, squatting and crawling. (EX 2).

B. CLAIMANT'S MEDICAL EVIDENCE

Claimant's Testimony

The claimant testified that he went to the clinic two days after the incident for treatment, after feeling dizzy and sore. (TR 21). The claimant added that he was sent for a CAT scan and was then placed temporarily on light duty. (TR 22). The claimant further stated that he developed neck pain in middle of April. *Id.* At the same time, the claimant testified that we was

experiencing a lot of personal problems, including his son's death in late April of 2001. (TR 25). The claimant sought treatment for his neck pain in August from Dr. Villanueva, his family doctor. (TR 26). On September 11, 2001, he was seen by Dr. Tornberg for X-rays and Dr. Tornberg placed the claimant on permanent work restrictions, prohibiting overhead work, lifting over twenty pounds, vertical ladders, squatting and crawling. (TR 27-28). Thereafter, on September 26, 2001, the claimant was seen by Dr. Wardell, who recommended that he take one month off from work until he had tests done on his shoulder. (TR 32).

The claimant stated that he has not been back to the shipyard since September 11, 2001. In early 2002, the claimant stated that he worked at McDonalds for a month. (TR 34). Currently, the claimant is working at Jezrell International, a missionary, where he earns approximately $125.00 a week.

Physician Opinions

The claimant has submitted medical records from the Newport News Shipbuilding clinic. (CX 12). The records show that on March 9, 2001, the claimant sought treatment after experiencing pain in his neck as a result of the wire feeder falling on his head on March 7, 2001. The examining physician opined that the claimant had suffered from a mild closed head injury and ordered an X-ray, CT scan, and placed the claimant on work restrictions..

On August 9, 2001, the claimant was examined by Rosabel M. Villanueva, M.D., his family physician. The claimant complained of pain in neck, with radiating pain in his shoulders, and numbness in his left hand. Dr. Villanueva opined that the claimant had a bulging disk at C4-5 and referred him to an orthopedic physician for further evaluation. On August 31, 2001, the claimant was again examined by Dr. Villanueva. (CX 7). The claimant continued to complain of chronic neck pain. Dr. Villaneuva ordered an MRI. Based upon the MRI, Dr. Villanueva opined that the claimant's C4-5 showed evidence of small broad right posterior/posterolateral disk protrusion with only minimal effacement of the right antero CSF space, with no other significant abnormality present. Again, on September 10, 2001, Dr. Villanueva examined the claimant and opined that the claimant had a bulging disk at the C4-5 level.

On September 26, 2001, the claimant sought treatment at Portsmouth Orthopedic Associates and was seen by Arthur W. Wardell, M.D. (CX 5). Dr. Wardell reviewed the claimant's most recent CT Scan and MRI. The claimant sought treatment for his continuing neck pain and radiating pain in his left shoulder to his left hand. Dr. Wardell noted the claimant's history of a left shoulder strain December 21, 1998. Based upon his examination of the claimant, Dr. Wardell concluded that the claimant had a cervical disc injury, cervical radiculopathy, left shoulder bursitis and dorsal spine strain. Dr. Wardell concluded that the claimant should remain on permanent work restrictions until tests could be completed on his left shoulder.

The claimant returned to Portsmouth Orthopedic Associates on October 24, 2001 with continuing complaints of pain in his neck radiating to his right shoulder and decreased sensation in his left hand. He was advised to proceed with carpal tunnel testing. On November 30, 2001, the claimant returned for a follow-up visit. The claimant complained of persistent pain in his neck and

left shoulder. On March 14, 2002, the claimant returned again with more complaints of pain in his upper back and left shoulder. Full range of motion with left trapezius tenderness was noted. The claimant was told to get an MRI and return. On August 19, 2002, the claimant returned, despite not having an MRI performed. Again, the claimant complained of pain in his neck radiating to the left shoulder and upper back.

Dr. Wardell was deposed on August 29, 2002. (CX 1). Dr. Wardell is the claimant's treating physician and a Board Certified Orthopedic Surgeon. (Wardell depo. at 4). Dr. Wardell initially noted the claimant's March 7, 2001 work-related injury. Dr. Wardell testified that he first examined the claimant on September 26, 2001. *Id.* The claimant reported off and on pain in his neck, which radiated down to his left shoulder into his left arm and left hand. (*Id*., at 5). Dr. Wardell noted that an MRI of the claimant's neck, taken on August 31, 2001, showed disk protrusion at C-4/5. (*Id*., at 5). As a result of his examination of the claimant and a review of his medical records, Dr. Wardell concluded that the claimant had incurred a disk injury to the C4-5 disk of his neck as result of accident on March 7, 2001. Dr. Wardell added that the claimant had left shoulder bursitis as a result of the trauma and upper back sprain. (*Id*., at 5-6). Dr. Wardell recommended that the claimant continue to work with the work restrictions, which were initially given by the shipyard. (*Id*., at 6).

Dr. Wardell examined the claimant again on October 24, 2001. The claimant continued to complain of pain in his neck. Additionally, he complained of diminished sensation in his left hand. (*Id*., at 7). Dr. Wardell sent the claimant for a Sims Weinstein test, an objective evaluation of a patient's sensation. The claimant had a tests done on both of his hands. (*Id*., at 7). On November 30, 2001, Dr. Wardell opined that the test results showed that the C-5 nerve distribution in his hand had diminished sensation. (*Id*., at 8). In addition, Dr. Wardell stated that the claimant had some active spasm in the right part of his neck and tenderness over the left rotator cuff area and left shoulder area. *Id.* Dr. Wardell testified that he continued to treat the claimant. Specifically, he saw the claimant on March 14, 2002, and August 19, 2002. (*Id*., at 9).

Based upon his treatment of the claimant, Dr. Wardell opined that the blow to the claimant's head, on March 7, 2001, caused the C4-5 injury. (*Id.*, at 10). Dr. Wardell reasoned that the MRI did not show evidence of significant degeneration, therefore, he did not think the single disk abnormality at C4-5 is due to wear and tear. *Id*. Accordingly, Dr. Wardell disagreed with Dr. Tornberg's conclusion that the claimant's neck injury is due to wear and tear and is unrelated to his injury on March 7, 2001. (*Id*. at 11). Dr. Wardell added that it is common, in neck and back injuries, for a patient to have a delay in symptoms, and that delay can easily be four weeks. (*Id.*, at 10). More specifically, Dr. Wardell stated that it takes muscles about a day to be sensitized, but after a disk injury there has to be a long cascade of physiological events that take place before the tissue is sensitized. (*Id.*, at 11).

Dr. Wardell further testified that it is common for disk pain to cause radiating pain to both shoulders, however, Dr. Wardell added that he felt the claimant had nerve irritation on the left side which caused the numbness in his left hand the left shoulder pain. (*Id.*, at 20).

Accordingly, Dr. Wardell opined that the claimant's left rotator cuff pain is not related to the March 2001 work-related injury. (*Id*., at 23). Dr. Wardell reiterated his conclusion that the claimant's neck injury is related to his March 7, 2001, work-related injury. (CX 2).

Timothy Budorick, M.D., submitted a medical report based upon his independent examination of the claimant on March 12, 2002 and a review of his medical records. (CX 4). Dr. Burdorick noted that the claimant reported that his symptoms had improved, however, the claimant continued to complain of periodic neck pain, especially with extension.

Dr. Budorick opined that the claimant has symptoms of mild neck pain, with evidence of a mild degenerative disk at C4-5. Dr. Budorick added that the claimant's neck pain may be related to the underlying disk condition, but that he was not certain. Dr. Budorick was similarly uncertain as to whether the claimant's neck injury is related to his March 7, 2001 work-related accident, since the claimant did not report symptoms of neck pain until five weeks after the accident. However, Dr. Budorick stated that it is possible that the March 7, 2001 incident injured the claimant's disk and caused a gradual delayed onset of symptoms.

Moreover, Dr. Budorick stated that the claimant no longer complained of tenderness or pain in his left shoulder or wrist. Dr. Budorick further stated that he found no evidence that the prior pain reported in these areas was related to the March 7, 2001 incident. Dr. Budorick opined that the claimant might benefit from physical therapy, since his only therapy thus far has been anti-inflammatory medication and muscle relaxers. With respect to the claimant's disability, Dr. Budorick concluded that he sees no reason, at this point, to restrict the claimant's activities in regards to his usual occupation.

C. EMPLOYER'S MEDICAL EVIDENCE

Physician Opinions

David N. Tornberg, M.D., submitted a medical report, dated November 30, 2001. (EX 1A). Dr. Tornberg is a physician and is the Medical Director at the Newport News Shipbuilding clinic. In addition, Dr. Tornberg is board-certified in orthopedic surgery.

Dr. Tornberg noted that he most recently examined the claimant on September 11, 2001. Dr. Tornberg added that a review of the claimant's August MRI showed a herniated disk and posterolateral disk protrusion. Dr. Tornberg further noted that he had examined the claimant several times at the clinic in March of 2001, after his March 7, 2001 injury. Dr. Tornberg noted that, while the claimant initially presented with a scalp laceration, by March 19, 2001 the claimant was asymptomatic and returned to work without restriction.

Based upon his September 11, 2001 examination of the claimant, Dr. Tornberg concluded that the claimant's present condition is a consequence of a longstanding degenerative changes in the cervical spine, consistent with ordinary diseases of life. Dr. Tornberg added that there is no related occupational illness or injury that is causally related to his present condition.

D. WAGE EARNING EVIDENCE

Both parties have agreed that the claimant earned $30,800.05 in the fifty two (52) weeks prior to the March 7, 2001 incident. However, the parties disagree as the amount of the claimant's average weekly wage (hereinafter "AWW"). The claimant asserts that his AWW is $687.50. The employer contends that the claimant's AWW is $592.31. The parties disagree as to whether the claimant's prior annual wage of $30,800.05 should be divided by the standard number of 260 or 224, the actual number of days worked by the claimant as a result of his 36 absences.

Additionally, the claimant has submitted evidence establishing that he was employed by McDonald's from Wednesday, May 21, 2002, working three days a week, until June 17, 2002. At McDonald's the claimant earned $5.85 an hour. Thereafter the claimant began employment with Jezreel International, beginning on June 17, 2002. The claimant works three days a week at Jezreel and earns $8.50 an hour. (CX 11). Accordingly, the parties have stipulated that the claimant's earning capacity is $125.00 a week.

IV. CONCLUSIONS OF LAW

An injured person must satisfy four elements in order to receive compensation under the LHWCA. *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 45 110 S.Ct. 381, 107 L.Ed.2d 278, 23 BRBS 96 (CRT) (1989). First, the person must be injured in the course of employment. 33 U.S.C. § 902(2). Next, the employer must have employees engaged in maritime employment. 33 U.S.C. § 902(4). Third, the injured person must have "status," that is, be engaged in maritime employment. 33 U.S.C. § 902(3); *Director, OWCP v. Perini N. River Assocs.*, 459 U.S. 297, 317, 103 S.Ct. 634, 74 L.Ed.2d 465 (1983). Finally, the injury must occur "upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)." 33 U.S.C. § 903(a).[3] This last element is the "situs" test. *E.g., Schwalb*, 493 U.S. at 45.

It is well established that, in arriving at his or her decision, an Administrative Law Judge is entitled to evaluate the credibility of all witnesses and to draw his or her own inferences and conclusions from the evidence. *Quinones v. H.B. Zachery, Inc.* 1998 WL 85580 (Ben. Rev. Bd. Feb. 10, 1998). Accordingly, the Administrative Law Judge's credibility determinations will not be disturbed unless they are inherently incredible or patently unreasonable. *Id.; Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Additionally, it has been consistently held that the Act must be construed liberally in favor of claimants. *Voris v. Eikel*, 346 U.S. 328, 333, 74 S.Ct. 88, 98 L. Ed. 5 (1953); *J. B. Vozzolo, Inc. v. Britton*, 377 F.2d 144 (D.C. Cir. 1967).

[3] See *Rodriquez v. Bowhead Transportation Co.*, ___ F.3d ___, (9th Cir. 2001)(No. 00-35280)(Oct. 26, 2001). "Vessel" includes "time charterer."

JURISDICTION[4]

In order for a claimant to be eligible for benefits, the LHWCA, as it was amended in 1972, required an injured worker to qualify under both a "situs" and a "status" test. *Pfeiffer Co. v. Ford*, 444 U.S. 69, 100 S.Ct. 328, 62 L.Ed 2d 225, 11 BRBS 320 (1979). The parties stipulated that the above-captioned claim is subject to the jurisdiction of the LHWCA. (TR 7-8).

RESPONSIBLE EMPLOYER

For a claim to be compensable, under the Act, the injury must arise out of and in the course of employment. 33 U.S.C. § 902(2). Therefore, an employer-employee relationship must exist at the time of the injury. *American Stevedoring Limited v. Marinelli*, ___ F.3d ___, No. 00-4180, 35 BRBS 41(CRT)(2d Cir. 2001) *citing Fitzgerald v. Stevedoring Services of America*, BRB No. 00-0724, 2001 WL 94757, at 4 (2001)(en banc). The parties have stipulated an employer/employee relationship existed between the parties at the time of the injury. (TR 6-7).

TIMELINESS OF NOTICE

Section 912 sets out the requirements for timely notice to an employer of injury or death. 33 U.S.C. § 912. Generally, an employee has 30 days to provide notice, and the clock starts to run when reasonable diligence would have disclosed the relationship between his injury and his employment. § 912(a); 20 C.F.R. § 702.212(a). Section 920(b) establishes a presumption that sufficient notice of the claim has been given. The parties have stipulated that the claimant gave a timely notice of injury to the employer. (TR 8).

TIMELINESS OF CLAIM

A worker must file an LHWCA claim within one year after the injury. 33 U.S.C.A. § 913(a); 20 C.F.R. § 702.221. Failure to file a claim within the year may bar any right to compensation. The parties have stipulated that the claimant filed a timely claim for compensation. (TR 8).

INJURY

Section 2(2) of the LHWCA defines an "injury" as an accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. 33 U.S.C. § 902(2)*; see U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of*

[4] Law of the Circuit in which injury occurs is applicable, here the Fourth Circuit. *Roberts v. Custom Ship Interiors*, ___ BRBS (May 15, 2001)(BRB No. 00-832). The Board and Ninth Circuit have distinguished "jurisdiction" from "coverage" of the Act. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 90 (1989) and *Perkins v. Marine Terminals, Corp.*, 673 F.2d 1097, 1100 (9th Cir. 1982)("Situs" question goes only to "coverage" not subject matter jurisdiction).

Workers Compensation Programs, U.S. Department of Labor, 455 U.S. 608, 102 S.Ct. 1312 (1982), *rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.*, 627 F.2d 455 (D.C. Cir. 1980).

The claimant bears the burden of proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused the harm, in order to establish his prima facie case.[5] *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990); *U.S. Industries/Federal Sheet Metal, Inc., v. Director, OWCP*, 455 U.S. 608, 616, 102 S.Ct. 1312, 1318, 71 L.Ed. 2d 495, [14 BRBS 631](1982); *Hargrove v. Strachan Shipping Co.*, 32 BRBS 11 (1998)(claimant need not prove impairment was "work-related" at this juncture only that conditions existed which could have caused it). An injury need not involve an unusual strain or stress; it makes no difference that the injury might have occurred wherever the employee may have been. *See Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968); *Glens Falls Indemnity co. v. Henderson*, 212 F.2d 617 (5th Cir. 1954). The claimant must establish each element of his prima facie case by affirmative proof. *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed. 2d 221, 28 BRBS 43(CRT)(1994).

The Act does not require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. *Bath Iron Works Corp. v. White*, 584 F.2d 569 (1st Cir. 1978).

Once the prima facie case is established, a presumption is created under Section 20(a) of the LHWCA that the employee's injury arose out of his or her employment.[6] 33 U.S.C. § 920(a). Moreover, Section 20(d) of the Act favors the claimant with a presumption that the injury suffered was not occasioned by the willful intention of the injured employee to injure or kill himself or another. *Green v. Atlantic & Gulf Stevedores, Inc.*, 18 BRBS 116 (1986).[7]

Once the presumption is invoked, the party opposing entitlement must present specific and comprehensive medical evidence proving the absence of or severing the (presumed) causal connection between such harm and employment or working conditions. *Manship v. Norfolk & Western Railway Co.*, 30 BRBS 175 (1996); *Holmes v. Universal Maritime Service Corp.*, 29 BRBS 18 (1995); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990); *Ranks v. Bath Iron Works Corp.*, 22 BRBS 301, 305 (1989); *Conoco, Inc. v. Director, OWCP*, 33 BRBS 187

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[5] Or, as the Board stated in *Kier v. Bethlehem Steel Corp*., 16 BRBS 128 (1984), that the claimant has the burden of establishing: (1) he or she sustained physical harm or pain; and, (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. But, a connection between the work and the harm need not be established at this stage. *Accord, Kelaita*, 13 BRBS at 331.

[6] This presumption applies only to the issue of whether an injury arises in the course of employment and, thus, is work-related; not to the issues of the nature and extent of disability. *Carlisle v. Bunge Corp*., 33 BRBS 133, BRB No. 98-1604 (Sept. 13, 1999) *citing Jones v. Genco, Inc*., 21 BRBS 12 (1998).

[7] *See Jackson v. Strachan Shipping Co*., 32 BRBS 71 (1998), regarding the relationship between section 3(c) and the section 20(a) presumption.

(CRT)(5th Cir. 1999); *Parsons Corp. of Cal. v. Director, OWCP*, 619 F.2d 38 (9th Cir. 1980). If an employer does not offer substantial evidence to rebut the presumption, the presumption provided by section 20(a) will entitle the claimant to compensation.[8] *See Del Vecchio v. Bowers*, 296 U.S. 280, 284-285, 102 S.Ct. 1312, 71 L.Ed.2d 495 (1935); *Universal Maritime Corp. v. Moore & Director, OWCP*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT)(9th Cir. 1999).[9]

The employer must rebut the presumption with substantial evidence that the claimant's condition was not caused or aggravated by his employment. *Quinones v. H.B. Zachery*, 1998 WL 85580 (Ben. Rev. Bd. Feb. 10, 1998); *Manship v. Norfolk & Western Railway Co.*, 30 BRBS 175 (1996). Where aggravation of a pre-existing condition is at issue, the employer must establish that work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury.[10] *Quinones, supra; Cairns v. Matson Terminals*, 21 BRBS 252 (1988); *Zea v. West State, Inc.*, ___ BRBS ___, BRB No. 97-931 (April 9, 1998).[11] In establishing rebuttal of the presumption, however, proof of another agency of causation is not necessary. *See Stevens v. Todd Pacific Shipyards*, 14 BRBS 626 (1982)(Kalaris, J., concurring & dissenting), *aff'd mem.*, 722 F.2d 747 (9th Cir. 1983), *cert. den.*, 467 U.S. 1243 (1984). The testimony of a physician that no relationship exists between an injury and the claimant's employment is sufficient to rebut the presumption.[12] *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984).

If the Administrative Law Judge finds the presumption is rebutted, it no longer controls and he must weigh all of the evidence and resolve the causation issue based on the record as a whole. *Devine v. Atlantic Container Lines, G.T.E.*, 25 BRBS 15 (1991). When the evidence as a whole is considered, it is the proponent (claimant) who has the burden of proof. *See, Director, OWCP v. Greenwhich Collieries*, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed.2d 221, [28 BRBS 43(CRT)(1994)].

Based upon the evidence of record, I find that the claimant has established the existence of an injury and that a work-related accident took place on March 7, 2001, and therefore, the claimant is entitled to the presumption, set forth in Section 20(a) that his injury arose out of his

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[8] While "substantial evidence requires 'more than a mere scintilla,' it is only 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Richardson v. Perales*, 402 U.S. 389, 410, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971); *see Sprague v. Director, OWCP*, 688 F.2d 862, 865 (1st Cir. 1982).

[9] In *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995), the Board held even where the record contains no medical evidence establishing causation, the claimant prevails unless the employer submits evidence sufficient to break the causal nexus.

[10] In *Fargo v. Campbell Industries*, 9 BRBS 766 (1978), the Board affirmed an award of permanent total disability benefits, stating the aggravation of a pre-existing arthritic condition by a work-related injury was completely compensable under the LHWCA. In *Plappert v. Marine Corps. Exchange*, 31 BRBS 13 (1997), the Board held the § 20(a) presumption rebutted where the claimant's disabling condition was caused by a subsequent, non-work related event.

[11] *Zea* also held lay evidence is not sufficient to establish an aggravation.

[12] Medical reports which did not affirmatively state decedent's cancer was not caused in part by asbestos exposure and absence of diagnostic evidence of asbestosis was not sufficient to rebut § 920(a) presumption. *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001).

employment. More specifically, the evidence of record unequivocally establishes that on March 7, 2001, the claimant was struck on the head by a wire feeder, weighing approximately thirty to sixty pounds. (TR 19). The claimant sought treatment two days after the incident from the shipyard clinic, complaining of a laceration to his head and dizziness. (TR 20). While the claimant did not seek treatment for his neck pain until August of 2001, Dr. Wardell, the claimant's treating physician, opined that the claimant's chronic neck pain is the result of the March 7, 2001 incident. Dr. Wardell testified that the claimant's August 2001 MRI did not show evidence of significant degeneration, and therefore, ruled out that the single disk abnormality at C4-5 is the result of wear and tear. More significantly, Dr. Wardell stated that it is not uncommon, in neck and back injuries, for an individual to have a delay in symptoms. However, Dr. Wardell testified that the claimant's left shoulder pain, with related numbness in his left hand, is not related to his March 2001 work accident. [13]

I further find that the employer has failed to present specific and comprehensive evidence that the claimant's condition was not caused by his employment. Specifically, Dr. Tornberg failed to sufficiently rule out that the claimant's chronic neck pain is the result of the March 7, 2001 incident. In his report, dated November 30, 2001, Dr. Tornberg stated that he examined the claimant at the shipyard clinic after the incident. Dr. Tornberg further noted that the claimant did not report symptoms of neck pain during the March 19, 2001 examination. Although the claimant sought treatment from Dr. Tornberg on September 11, 2001 for his neck pain, Dr. Tornberg opined that his pain was the result of longstanding degenerative changes in his cervical spine. However, Dr. Tornberg failed to address whether it was possible for the claimant to suffer from a delayed onset of symptoms related to the March 7, 2001 incident. To the contrary, Dr. Tornberg summarily concluded that his alleged neck pain is the result of a degenerative condition. For this reason, I have given Dr. Tornberg's opinion little weight.

Additionally, Dr. Budorick, who conducted an independent medical evaluation of the claimant on March 12, 2002, offered only an equivocal conclusion regarding the causation of the claimant's chronic neck pain. Dr. Budorick noted the claimant's degenerative disk at C4-5 and added that the claimant's neck pain may be related to the underlying disk condition, but that he was uncertain. Moreover, Dr. Budorick stated that while the claimant did not report symptoms of neck pain until five weeks after the work incident, he opined that it is possible that the incident injured the claimant's disk and caused a gradual delayed onset of symptoms. Since Dr. Burdorick's medical conclusion regarding the causation of the claimant's neck pain was wholly equivocal, I find that his opinion is entitled little weight.

While the employer's counsel has argued that the claimant's neck pain is likely the result of stress and anxiety, there is no medical evidence record which supports this contention. The employer has failed to provide any specific or comprehensive evidence rebutting that the claimant's injury arose out of his employment. As stated earlier, the employer must rebut the presumption with substantial evidence that the claimant's condition was not caused or aggravated by his employment. *Quinones v. H.B. Zachery*, 1998 WL 85580 (Ben. Rev. Bd. Feb. 10, 1998);

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[13] While in August of 2001, Dr. Villanueva, the claimant's family physician, noted that the claimant had a bulging disk at the C4-5 level. Dr. Villanueva did not address the causation of the claimant's bulging disk.

Manship v. Norfolk & Western Railway Co., 30 BRBS 175 (1996). Accordingly, I find that the claimant has established that his neck injury is the result of his March 7, 2001 work incident.

DISABILITY

Section 2(10) of the LHWCA defines "disability" as the incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.[14] 33 U.S.C. § 902(10); *see also, Metro Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 127 (1997). In order for a claimant to receive disability benefits, he must have an economic loss coupled with a physical or psychological impairment. *Sproull v. Stevedoring Services of America*, 25 B.R.B.S. 100, 110 (1991); *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Owens v. Traynor*, 274 F. Supp. 770 (D.Md. 1967), *aff'd*, 396 F.2d 783 (4th Cir. 1968), *cert. denied*, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. *Nardella v. Campbell Machine, Inc.*, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. *American Mutual Insurance Company of Boston v. Jones*, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (*Id*. at 1266).

The claimant bears the initial burden of establishing the nature and extent of any disability sustained as a result of a work-related injury without the benefit of the Section 20 presumption. *Lombardi v. Universal Maritime Service*, 32 BRBS 83 (1998); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985); and, *Hunigman v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 141 (1978). However, once the claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. *Lentz v. Cottman Co.*, 852 F.2d 129, 131 (4th Cir. 1988); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Air America v. Director*, 597 F.2d 773 (1st Cir. 1979); *American Stevedores, Inc. v. Salzano*, 538 F.2d 933 (2d Cir. 1976); *Preziosi v. Controlled Industries*, 22 BRBS 468, 471 (1989); *Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984).

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[14] A disability determination turns on the claimant's capacity for work rather than her actual employment status. *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988); *Newport news Shipbuilding and Dry Dock Company v. Director, OWCP [Wiggins]*, No. 00-2532 (4th Cir. December 14, 2001)(Unreported). Although such an award is the exception, a claimant may still be entitled to permanent and total disability benefits following a period of employment. See, *e.g., Haughton Elevator Co. v. Lewis*, 572 F.2d 447 (4th Cir. 1978) (claimant worked in spite of excruciating pain); *Paul v. General Dynamics Corp*., 13 BRBS 1073 (1981) (claimant's employment only possible due to extraordinary effort); *Walker v. Pacific Architects & Engineers Inc*., 1 BRBS 145 (1974) (claimant's employment due merely to employer's benevolence).

1. EXTENT OF DISABILITY - TOTAL vs. PARTIAL

A claimant has the burden of proving a *prima facie* case of total disability by showing he cannot return to his regular employment due to a work-related injury.[15] *Trask v. Lockheed Shipbuilding Co.*, 17 BRBS 56, 59 (1980). At the initial stage, a claimant need not establish he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C & P Tel. Co.*, 16 BRBS 89 (1984); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988)(due to permanent restrictions against heavy lifting and excessive bending, employee could not resume usual job as sandblaster).

2. NATURE OF DISABILITY - PERMANENT vs. TEMPORARY

A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *General Dynamics Corporation v. Benefits Review Board*, 565 F.2d 208 (2d Cir. 1977); *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989); *Trask v. Lockheed Shipbuilding and Construction Company*, 17 BRBS 56 (1985); *Mason v. Bender Welding & Machine Co.*, 16 BRBS 307, 309 (1984).

The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." An injured worker's impairment may be found to have changed from temporary to permanent if and when the employee's condition reaches the point of "maximum medical improvement" or "MMI."[16] *James v. Pate Stevedoring Co.*, 22 BRBS 271, 274 (1989); *Phillips v. Marine Concrete Structures*, 21 BRBS 233, 235 (1988); *see SGS Control Services v. Director, OWCP*, 86 F.3d 438, 443-44 (5th Cir. 1996); *Director, OWCP, v. Berkstresser*, 921 F.2d 306, 312 (D.C. Cir. 1991). Any disability before reaching MMI would be temporary in nature. *Id*.

The determination of when maximum medical improvement is reached, so that a claimant's disability may be said to be "permanent," is primarily a question of fact based on medical evidence. *Lozada v. Director, OWCP*, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989); *Care v. Washington Metropolitan Area Transit Authority*, 21 BRBS 248 (1988); *Wayland v. Moore Dry Dock*, 21 BRBS 177 (1988); *Eckley v. Fibrex and Shipping Company*, 21 BRBS 120 (1988); *Williams v. General*

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[15] Even if able to work, one may be found totally disabled if working with extraordinary effort and in excruciating pain. *See Argonaut Ins. Co. v. Patterson*, 846 F.2d 715 (11th Cir. 1988) and *Louisiana Insurance Guaranty Association v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000); and *Newport news Shipbuilding and Dry Dock Company v. Director, OWCP [Wiggins]*, No. 00-2532 (4th Cir. December 14, 2001)(Unreported).

[16] If a claimant shows he is disabled under the Act and MMI has not been reached, the appropriate remedy is an award of temporary total or partial disability, under Section 8(b) or (e). *Carlisle v. Bunge Corp*., 33 BRBS 133, BRB No. 98-1604 (Sept. 13, 1999) *n. 10, citing* 33 U.S.C. § 908(b) and *Hoodye v. Empire/United Stevedores*, 23 BRBS 341 (1990).

Dynamics Corp., 10 BRBS 915 (1979).

The date of maximum medical improvement is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. The date on which a claimant's condition becomes permanent is primarily a medical determination, regardless of economic or vocational considerations. *Manson v. Bender Welding & Machine Co.*, 16 BRBS 307, 309 (1984); *Louisiana Insurance Guaranty Association v. Abbott*, 27 BRBS 192 (1993), *aff'd* 40 F. 3d 122 (5th Cir. 1994)(doctor said nothing further could be done); *Newport News Shipbuilding & Dry Dock v. Director, OWCP, (Brickhouse)*, ___ F.3d ___ (4th Cir. 2002); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988). Medical evidence must establish the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56, 60 (1985). A date of permanency may not be based, however, on the mere speculation of a physician. *See Steig v. Lockheed Shipbuilding & Construction Co.*, 3 BRBS 439, 441 (1976). Furthermore, evidence of the ability to do alternate employment is not relevant to the determination of permanency. *Berkstresser v. Washington Metro. Area Transit Authority*, 16 BRBS 231, 234 (1984), *rev'd on other grounds sub nom., Director, OWCP v. Berkstresser*, 921 F.2d 306 (D.C. Cir. 1990).

An Administrative Law Judge must make a specific factual finding regarding maximum medical improvement, and cannot merely use the date when temporary total disability is cut off by statute. *Thompson v. Quinton Engineers*, 14 BRBS 395, 401 (1985). In the absence of any other relevant evidence, the judge may use the date the claim was filed. *Whyte v. General Dynamics Corp.*, 8 BRBS 706, 708 (1978).

Where the medical evidence indicates that the worker's condition is improving and the treating physician anticipates further improvement in the future, it is not reasonable for a judge to find that maximum medical improvement has been reached. *Dixon v. John J. McMullen & Assocs.*, 19 BRBS 243, 245 (1986). Similarly, where a treating physician stated that surgery might be necessary in the future and that the claimant should be reevaluated in several months to check for improvement, it was reasonable for the Administrative Law Judge to conclude the claimant's condition was temporary rather than permanent. *Dorsey v. Cooper Stevedoring Co.*, 18 BRBS 25, 32 (1986), *pet. dismissed sub nom., Cooper Stevedoring Co. v. Director, OWCP*, 826 F.2d 1011 (11th Cir. 1987); *Kuhn v. Associated Press*, 16 BRBS 46, 48 (1983).

Permanent disability has been found where little hope exists of eventual recovery, *Air America, Inc. v. Director, OWCP*, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, *Meecke v. I.S.O. Personnel Support Department*, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, where work within claimant's work restrictions is not available, *Bell v. Volpe/Head Construction Co.*, 11 BRBS 377 (1979), and on the basis of

claimant's credible complaints of pain alone.[17] *Eller and Co. v. Golden*, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, *Ballard v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 676 (1978); *Ruiz v. Universal Maritime Service Corp.*, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. *Bell, supra. See also Walker v. AAF Exchange Service*, 5 BRBS 500 (1977); *Swan v. George Hyman Construction Corp.*, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability. *Mendez v. Bernuth Marine Shipping, Inc.*, 11 BRBS 21 (1979); *Perry v. Stan Flowers Company*, 8 BRBS 533 (1978).

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. *Lozada v. General Dynamics Corp.*, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. *Meecke v. I.S.O. Personnel Support Department*, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. *Exxon Corporation v. White*, 617 F.2d 292 (5th Cir. 1980), *aff'g* 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. *Fleetwood v. Newport News Shipbuilding and Dry Dock Company*, 16 BRBS 282 (1984), *aff'd*, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985); *Watson v. Gulf Stevedore Corp., supra*..

3. CONCLUSIONS REGARDING NATURE & EXTENT OF DISABILITY

In conclusion, based on the credible testimony of the claimant, and fully supported by the medical opinion of his treating physician, Dr. Wardell, I find that the claimant is entitled to temporary partial disability benefits beginning September 11, 2001 to the present and continuing.[18] As the uncontroverted evidence of record establishes that the claimant was placed on permanent work restriction on September 11, 2001 by Dr. Tornberg, the shipyard physician, as a result of his chronic neck pain. (EX 2). More specifically, Dr. Tornberg directed the claimant to avoid overhead work, lifting over twenty pounds, vertical ladders, squatting and crawling. (EX 2). Accordingly, the claimant has not returned to work for the employer since September 11, 2001.

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[17] Claimant's credible testimony of the constant pain endured while performing work activity may constitute a sufficient basis for an award notwithstanding considerable evidence the claimant can perform certain types of work activity. *Mijangos v. Avondale Shipyards, Inc*., 948 F.2d 941, 25 BRBS 78 (5th Cir. 1991).

[18] One who is temporarily and partially disabled is entitled to the usual measure of benefits but for only five years.

In addition, the claimant testified that at this time he is unable to perform his full duty work as a sheet metal welder. (TR 35). However, the claimant is currently employed by Jezrell International, a missionary, where he earns approximately $125.00 a week. [19] Since I have found that the claimant has established that his chronic neck pain is the result of the March 7, 2001 incident, I find that the claimant is entitled to temporary partial disability benefits.

The claimant is not seeking permanent partial disability benefits, nor does the evidence of record support such an award, since the claimant presented no evidence regarding "maximum medical improvement." Moreover, there is no evidence that the claimant's condition will not improve, since the claimant has yet to undergo physical therapy.

In addition, despite the claimant's assertion, I do not find that the evidence of record establishes that the claimant was totally disabled from October 24, 2001 to November 24, 2001 as a result of the March 7, 2001 incident. Based upon his October 24, 2001 examination of the claimant, Dr. Wardell directed the claimant to take one month off from work, in order to have tests done on his left shoulder. (TR 32). However, Dr. Wardell added that the claimant's pain in his left shoulder was not related to his March 7, 2001 work accident. For this reason, I do not find that the claimant has sufficiently established that he was temporarily totally disability for one month as a result of his work related incident.

COMPENSATION FORMULAE[20]

Section 8 of the Act, identifies four different categories of disability and sets forth the scheme for the payment of compensation for disability for each.[21] Section 8(a) deals with permanent total disability. Section 8(b) deals with temporary total disability. Section 8(c), dealing with permanent partial disability, covers twenty different specific injuries and an additional provision which applying to an injury not included within the list of specific injuries. Section 8(d) deals with payment to survivors of certain unpaid employee benefits. Section 8(e) deals with temporary partial disability.[22]

Temporary Partial Disability

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[19] The claimant failed to provide a description of his work at Jezrell International.

[20] Benefits may not be awarded for pain and suffering. *Young v. Todd Pacific Shipyards Corp.*, 17 BRBS 201 (1985). In cases under the schedule where a claimant has a prior injury which has already been compensated, under the Act, and a subsequent injury results in increased disability to the scheduled body part, the employer is only liable for the increased disability. *Clark v. Todd Shipyards Corp.*, 20 BRBS 30, 31 (1987) *aff'd sub. nom. Todd Shipyards Corp. v. Director, OWCP*, 848 F.2d 125, 21 BRBS 114 (CRT)(9th Cir. 1988); *Brown v. Bethlehem Steel Corp.*, 19 BRBS 200, *on recon.*, 20 BRBS 26 (1987), *aff'd in pertinent part sub. nom., Director, OWCP v. Bethlehem Steel Corp.*, 868 F.2d 759, 22 BRBS 47 (CRT)(5th Cir. 1989).

[21] Section 6(b)(1) imposes a cap on both disability and death benefits equivalent to 200 percent of the national average weekly wage.

[22] No compensation, except medical benefits, may be paid for the first three days of a disability unless the injury results in disability of more than fourteen days. 33 U.S.C. § 906(a).

Section 8(e) provides that in the case of temporary partial disability, the compensation is 66 2/3 percent of the difference between the employee's AWW before the injury and his wage-earning capacity after the injury, in the same or another employment, for the continuance of such disability, but in no case exceeding five years. *Steevens v. Umpqua River Navigation*, 35 BRBS 129 (July 17, 2001); *See Turk v. Eastern Shore Railroad Inc., & Director, OWCP*, 34 BRBS 27 (BRB 2000)(allowing award beyond hearing date) and *Admiralty Coatings Corp. v. Emery*, ___ F.3d ___ (4th Cir. No. 97-2639)(Sept. 21, 2000)(Authority to award TPD benefits beyond date of evidentiary hearing). In the instant matter, the parties have agreed that the claimant's wage earning capacity from September 11, 2001 to the present and continuing is $125.00 a week.

AVERAGE WEEKLY WAGE[23]

For the purposes of Section 10 and the determination of the employee's average weekly wage with respect to a claim for compensation for death or disability due to an occupational disability, the time of injury is the date on which the employee or claimant becomes aware, or on the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. *Todd Shipyards Corp. v. Black*, 717 F.2d 1280 (9th Cir. 1983) *cert. denied*, 466 U.S. 937, 104 S.Ct. 1910, 80 L.Ed.2d 459 (1984); *Hoey v. General Dynamics Corporation*, 17 BRBS 229 (1985); *Pitts v. Bethlehem Steel Corp.*, 17 BRBS 17 (1985); *Yalowchuck v. General Dynamics Corp.*, 17 BRBS 13 (1985). Compensation should be calculated at the time of disability, not the time of the injury. *Johnson v. Director, OWCP*, 911 F.2d 247 (9th Cir. 1990); *Bourgeois v. Avondale Shipyards & Director, OWCP*, 121 F.3d 219, 31 BRBS 137(CRT)(5th Cir. 1997); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995)(involving a latent disability surfacing years after the initial injury).

The Act provides three methods for computing a claimant's average weekly wage: the first, where an employee has worked in his regular employment substantially the whole of the year preceding his injury; the second, where the employee did not so work; and, the third, where neither of the former two methods can be reasonably and fairly applied.

Section 10(a)

Section 10(a) of the Act states, "[i]f the injured employee shall have worked in the employment for which he was working at the time of the injury . . . during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of[a multiple of] the average daily wage . . . which he shall have earned in such employment during the days when so employed. 33 U.S.C. § 910(a).

"Substantially the whole of the year" refers to the nature of Claimant's employment, i.e., whether it is intermittent or permanent, *Eleazar v. General Dynamics Corporation*, 7 BRBS 75

[23] The term "wages" is defined at § 2(13). See *Universal Maritime Service Corp. v. Wright*, 155 F.3d 311, 319, 33 BRBS 15, 20(CRT)(4th Cir. 1998) for Fourth Circuit's interpretation of § 2(13). *See Universal Maritime Service Corp. v. Director, OWCP*, 155 F.3d 311, 33 BRBS 15(CRT)(4th Cir. 1999) for a comprehensive discussion of vacation, holiday and container royalty payments as wages within meaning of § 902(13).

(1977), presupposes that he could have actually earned wages during all 260 days of that year, *O'Connor v. Jeffboat, Inc.*, 8 BRBS 290, 292 (1978), and that he was not prevented from so working by weather conditions or by the employer's varying daily needs. *Lozupone v. Stephano Lozupone and Sons*, 12 BRBS 148, 156 and 157 (1979). A substantial part of the year may be composed of work for two different employers where the skills used in the two jobs are highly comparable. *Hole v. Miami Shipyards Corp.*, 12 BRBS 38 (1980), *rev'd and remanded on other grounds*, 640 F.2d 769 (5th Cir. 1981). The Board has held that since Section 10(a) aims at a theoretical approximation of what a claimant could ideally have been expected to earn, time lost due to strikes, personal business, illness or other reasons is not deducted from the computation. *See O'Connor v. Jeffboat, Inc.*, 8 BRBS 290 (1978). *See also Brien v. Precision Valve/Bayley Marine*, 23 BRBS 207 (1990); *Klubnikin v. Crescent Wharf & Warehouse Co.*, 16 BRBS 183 (1984).

Moreover, since average weekly wage includes vacation pay in lieu of vacation, it is apparent that time taken for vacation is considered as part of an employee's time of employment. *See Waters v. Farmer's Export Co.*, 14 BRBS 102 (1981), *aff'd per curiam*, 710 F.2d 836 (5th Cir. 1983). *Duncan v. Washington Metropolitan Area Transit Authority*, 24 BRBS 133, 136 (1990); *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1987). The Board has held that 34.4 weeks' wages do constitute "substantially the whole of the year," *Duncan v. Washington Metropolitan Area Transit Authority*, 24 BRBS 133, 136 (1990), but 33 weeks is not a substantial part of the previous year. *Lozupone v. Stephano Lozupone & Sons*, 12 BRBS 148 (1979) at 156.

Under section 10(a), a judge must determine the total income earned by a claimant in the 52 weeks prior to the accident and to divide that sum by the actual number of days for which the employee was paid to determine an average daily wage. *Diodado v. Newpark Shipbuilding & Repair Inc*., B.R.B. No. 96-1585 (Ben. Rev. Bd June 10, 1997). This daily wage must then be multiplied by 300, if the judge determines the claimant worked a six-day week, or by 260, if the claimant worked a five-day week, yielding the claimant's average yearly salary. *See* 33 U.S.C. § 910(a).[24] Finally, this yearly number must be divided by 52 to yield the average weekly wage. 33 U.S.C. § 910(d)(1); *see also Universal Maritime Corp., v. Moore & Director, OWCP*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997).

While both parties have agreed that the claimant earned $30,800.05 in the fifty two (52) weeks prior to the March 7, 2001 incident, the parties disagree as the amount of the claimant's average weekly wage (hereinafter "AWW"). The claimant asserts that his AWW is $687.50. The employer contends that the claimant's AWW is $592.31. The parties disagree as to whether the

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[24] 33 U.S.C. § 910(a) states:

> If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

claimant's prior annual wage of $30,800.05 should be divided by the standard number of 260 or 224, the actual number of days worked by the claimant as a result of his 36 absences. However, under section 10(a), a judge must determine the total income earned by a claimant in the 52 weeks prior to the accident and divide that sum by the *actual number of days for which the employee was paid* to determine an average daily wage. *Diodado, supra.* Accordingly, I find that the claimant's annual salary of $30,800.05 should be divided by 224, the actual number of days the claimant worked. This calculation yields an average daily wage of $137.50. Multiplying the average daily wage of $137.50 by 260 days, in accordance with 33 U.S.C. § 910(a), provides an average weekly wage of $687.50.

INTEREST

A claimant is entitled to interest on any accrued unpaid compensation benefits.[25] *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556, 559 (1978), *aff'd in part, rev'd in part sub nom., Newport News Shipbuilding & Dry Dock Company v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The rate is that used by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills… ." *Grant v. Portland Stevedoring Co.*, 16 BRBS 267, 270 (1984), *modified on recon.*, 17 BRBS 20 (1985). Interest is mandatory and cannot be waived in contested cases. *Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833 (1982); *MacDonald v. Sun Shipbuilding & Dry Dock Co.*, 10 BRBS 734 (1978). The Board has held that the date that employer knows of an injury and therefore incurs an obligation to pay benefits under 33 U.S.C. §914(b) is critical in determining the onset date for the accrual of interest. *Renfroe v. Ingalls Shipbuilding, Inc.*, 30 BRBS 101 (1996)(retired employee with hearing loss), at 105-106; *Meadry v. International Paper Co.*, 30 BRBS 160 (1996).

V. CONCLUSIONS

I find that Mr. Butler is partially and temporarily disabled from performing his employment as a shipyard welder, beginning September 11, 2001 to the present and continuing. The responsible employer/carrier is Newport News Shipbuilding and Drydock Company. The claimant's average weekly wage is $ 687.50 and his current earning capacity is $125.00 a week.

VI. ATTORNEY'S FEES AND COSTS

Thirty (30) days is hereby allowed to the claimant's counsel for the submission of such an application. See, 20 C.F.R. § 702.132. A service sheet showing that service has been made upon all the partes, including the claimant, must accompany the application. Parties have fifteen (15) days following receipt of any such application within which to file any objections.

ORDER

[25] The Benefits Review Board has held that the employer must pay appropriate interest on untimely paid funeral benefits as funeral expenses are "compensation" under the Act. *Adams v. Newport News Shipbuilding*, 22 BRBS 78, 84 (1989). Claimant's are entitled to post-judgment interest on the unpaid award of pre-judgment interest, calculated from the date the ALJ's order was issued. *Brown v. Alabama Dry Dock and Shipbuilding Corp*., 28 BRBS 160 (1994).

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore ORDERED that:

1. The employer, Newport News Shipbuilding and Dry Dock Company, shall pay to the claimant compensation for his temporary partial disability from September 11, 2001 to the present and continuing, based upon an average weekly wage of $687.50 such compensation to be computed in accordance with section 8(b) of the Act.

2. All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.[26]

3. Interest shall be paid by the employer on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director. All under-payments of compensation shall be paid to the claimant in a lump sum with interest at the rate provided in 28 U.S.C. § 1961.

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RICHARD A. MORGAN
Administrative Law Judge

RAM:dmr

[26] Motions for reconsideration before the ALJ are not provided for in the regulations (except 20 C.F.R. 802.221 BRB rules), are governed by FRCP 6(a) and must be filed within ten days (excluding weekends and holidays in most cases). *Galle v. Ingalls Shipbuilding, Inc.*, 35 BRBS 17 (CRT), BRB No. 98-1635 (Sept. 20, 1999), ___F.3d ___ , Case No. 00-60075 (5th Cir. 2001).

APPEAL RIGHTS: Appeals may be taken to the Benefits Review Board, U.S. Department of Labor, Washington, D.C. 20210, by filing a notice of appeal with the district director for the compensation district in which the decision or order appealed from was filed, within thirty (30) days of the filing of the decision or order, and by submitting to the Board a petition for review, in accordance with the provisions of part 802 of 20 C.F.R..